IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

BRAIDWOOD MANAGEMENT, et al.,	)	
Plaintiffs,	)	CASE NO. 4:20-cv-00283-O
VS.	)	FORT WORTH, TEXAS
XAVIER BECERRA, et al.,	)	
Defendant.	)	JULY 26, 2022

VOLUME 1 of 1
TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE REED C. O'CONNOR
UNITED STATES DISTRICT COURT JUDGE

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I N D E X

P R O C E E D I N G S

JULY 26, 2022

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THE COURT: Okay. Please be seated.

We will turn then and start instead with Case No. 4:20-283, John Kelley and others vs. Xavier Becerra and others.

Counsel for the plaintiffs, both of you are here.

Counsel for the defendants are here.

So, Mr. Mitchell, why don't you come to the podium and let me let you make a presentation on why you believe you have standing, and then why you believe your motion should be granted.

MR. MITCHELL: Thank you. Thank you, your Honor, and may it please the Court.

With the Court's permission, I would like to begin with the issues of Article III standing. There are many issues that have been raised. And if the Court wishes, I may stop, if I could, after standing to allow my opposing counsel to respond.

THE COURT: Great.

MR. MITCHELL: Before we proceed on the merits, if the Court's okay with that?

THE COURT: That's acceptable to me, if it's acceptable to your colleagues.

MR. LYNCH: Yes.

MR. MITCHELL: Thank you.

So the government is, as your Honor knows, vigorously contesting our clients' standing to bring this lawsuit, as they have done since the outset of this litigation.

Most of the arguments that the government is making with respect to our clients' standing are arguments that this Court need not reach, and in our respectful submission, should not reach.

That is because only one plaintiff needs to demonstrate Article III standing under the Supreme Court's precedent if each of the plaintiffs in the case is requesting the same relief from the Court.

And Braidwood Management, Incorporated, has, by far, the easiest case for standing. It is seeking the same relief as the other plaintiffs. And we believe, if the Court agrees with our position, that Braidwood Management has standing, it's not necessary to inquire whether each of the additional plaintiffs would have standing in a case where Braidwood Management was not a co-plaintiff to the case.

Braidwood Management clearly has standing because the preventive care mandates have commandeered its self-insured plan, and it requires Braidwood Management to

change the content of its own plan to provide coverage that it does not want to provide and to do so with no cost-sharing arrangements.

Braidwood has no ability under this regime to decide to impose co-payments for any of the preventive care that these agencies have purported to require. It cannot allow any of those expenses to count toward an employee's annual deductible.

It has lost control over the self-insured plan that it had prior to the imposition of these preventive care mandates.

So our argument will proceed in a syllogism, if I could explain this to the Court. The major premise of our syllogism is that only one plaintiff needs standing if all the plaintiffs are seeking the same relief.

The minor premise of our argument is Braidwood has standing. And the conclusion that follows is that all of the plaintiffs therefore have Article III standing to bring the claims.

So the government must defeat either the major premise or the minor premise of the syllogism to defeat our case for Article III standing. And the government does contest both the major premise and minor premise.

Let me begin, if I could, with the major premise: Only one plaintiff needs standing. The government claims

that the one-plaintiff rule doesn't apply to this case.

And their argument proceeds as follows: They claim that Braidwood Management would not be entitled in the end to what they describe as a universal injunction.

Their position is, if Braidwood prevails, it should get the declaratory and injunctive relief that is limited to Braidwood and that does not extend beyond Braidwood to other plaintiffs in the case.

It makes the same claim with respect to our other plaintiffs. So its view is we're not actually seeking the same relief. Braidwood is seeking relief for Braidwood. Mr. Kelley is seeking relief for Mr. Kelley and so on.

But that's not the proper inquiry of the Article III standing phase. In considering whether a plaintiff has shown redressability under the Article III test for standing, a court must assume that the plaintiff will ultimately succeed on the merits and assume the plaintiff will seek and obtain the relief he is requesting, regardless of whether the plaintiff is ultimately entitled to the relief.

The entitlement to the relief goes to the merits; it doesn't go to standing. And the Supreme Court has said time and time again that a court is to ask whether the requested relief, not the relief to which it's ultimately entitled, but whether the requested relief will redress the

plaintiff's alleged injuries.

If I could quote recently from the Supreme Court's Ted Cruz for Senate case. This is the Supreme Court's most recent pronouncement on Article III standing.

The Court writes: "For standing purposes, we accept as valid the merits of appellee's legal claims."

Quoting again from the Supreme Court in Steel Co., "There must be redressability, a likelihood that the requested relief will redress the alleged injury."

So for the standing analysis, the Court should assume that the plaintiffs will obtain the relief they request. Even if the Court ultimately disagrees with our merits argument and concludes we're not entitled to the scope of this relief, the Court still has to assume we will get that relief and ask, will that relief redress the alleged injury?

So going back to the one-plaintiff rule. Braidwood Management, Incorporated, just like Mr. Kelley, just like all the other individual plaintiffs in the case, all of them are requesting the same relief from this Court: a declaratory judgment that pronounces the preventive mandates unconstitutional because of the appointments clause problems and because of the RFRA problems with respect to the prEP and other mandates, and injunctive relief that would restrain the defendants from enforcing them in any

situation.

That's the requested relief. All the plaintiffs are requesting the same relief. Therefore, the one-plaintiff rule applies. And the Court just asks: Does one plaintiff have standing? And if the answer to that question is yes, the other plaintiffs can come along for the ride.

Let me shift to the minor premise of the argument. Braidwood has standing. Now, this is an easy case with respect to Braidwood. I think the other plaintiffs present closer questions, although we believe they have standing as well under the purchaser doctrine.

Let's just focus on Braidwood for a moment because we only need to show standing for one. These preventive care mandates are commandeering the self-insured plan that Braidwood Management incorporates, administers, and provides to its employees.

It requires Braidwood to change the contents of that plan. It requires Braidwood to alter the plan to say these services will now be covered with no co-pays. Even though, before the mandates, Braidwood did not cover this stuff.

That inflicts injury in fact, regardless of whether there is an ultimate financial harm to Braidwood. The government is suggesting Braidwood doesn't have standing

to challenge the prEP mandate, because they say it's not likely that any of its employees would ever seek reimbursement for those expenditures.

That may very well be true, but there are two responses to that. Number one, Braidwood is challenging far more than just a prEP mandate. Braidwood is asking this Court to restrain the defendants from enforcing any of the preventive care mandates because they violate the appointments clause.

As I understand the government's reply brief, and the government should correct me if I'm wrong, they don't appear to be challenging Braidwood's standing to present an appointments clause claim. They focus only on this issue of the prEP drugs.

So it appears, and the government, again, they should tell the Court if I'm mischaracterizing their argument, but it appears they're questioning Braidwood's standing only with respect to the RFRA claim and not with respect to the appointments clause claim.

But there's a second point as well. Even if the government is right to suggest that Braidwood's employees are unlikely to wind up requiring Braidwood to pay for prEP drugs, there's still injury in fact, because Braidwood has to change the contents of its plan.

Even if there's never an ultimate financial harm

to Braidwood, Braidwood has to make changes to its plan. And that's enough for standing, because all one needs for standing is an identifiable trifle.

THE COURT: Identifiable what?

MR. MITCHELL: Trifle. That's from the Supreme Court's opinion in SCRAP, 1973. It appears in the footnote.

An identifiable trifle is enough for standing to take Braidwood out of the realm of mere ideological injury and into a situation where Braidwood actually has been affected by the contraceptive mandate.

And the fact that it has to change the plan gives it standing, even if the government's right to suggest with respect to prEP drugs, they will never really have to pay anything out because they don't have employees who will ever claim that benefit. All we need is the identifiable trifle and we have that here with respect to Braidwood.

So let me return, if I could, to the syllogism. The major premise of the argument: The one-plaintiff rule applies. The minor premise of the argument: Braidwood has standing.

If the Court accepts the major premise and the minor premise, the conclusion that follows, as a matter of logic, is that every one of the plaintiffs has Article III standing to seek the same relief that Braidwood is requesting.

Namely, a declaration from this Court that the preventive care mandates are unlawful and an injunction that restrains the defendants from enforcing them. So that's my presentation on standing. I will yield to Mr. Lynch, unless you have any questions?

THE COURT: So just let me, just before we turn it over.

MR. MITCHELL: Yes.

THE COURT: Their argument is that Braidwood -- well, let me back up.

Braidwood is self-insured. Can you tell me what that means?

MR. MITCHELL: Self-insured means that they are ultimately paying the money out for the health benefits, rather than have an insurer hold the risk for them.

THE COURT: And does that mean that Braidwood acts as an insurance company?

MR. MITCHELL: Essentially, it does, with respect to its own employees.

So what they do is they retain a third-party administrator to actually administer the plan, but Braidwood decides the contents of the plan, and says this is what we cover; this is what we don't. These are the co-pays; these are the deductibles. They make all the decisions themselves as the company, because they are the ultimate insurer.

Now, they had the prerogative prior to the Affordable Care Act to decide the scope of coverage with respect to preventive care. They no longer have that prerogative and that affects injury in fact.

THE COURT: A little bit more on the self-insurance issue. If you are self-insured, you are acting as an insurance company and that means you have to comply with the mandates that the federal government has put into play?

MR. MITCHELL: That's correct. You have to provide all the preventive care that has been dictated by these relevant entities: HRSA, ACIP, and the Task Force, and you have to provide it at zero marginal cost to the patient. No co-pays can be imposed and it can't count for your annual deductible.

THE COURT: I see.

MR. MITCHELL: So, again, we think that's an easy case for standing.

Your Honor, to be clear, we're not conceding in any way that our remaining plaintiffs would lack standing in the absence of Braidwood. We acknowledge they present closer cases.

The purchaser standing doctrine, which is well-developed in the D.C. Circuit, the government's right to point out that the Fifth Circuit hasn't adopted that.

Now, they haven't rejected it either. We think it's a sound theory of standing, but this is a much more solid basis for standing, to rely on Braidwood.

We just don't think it's necessary for the Court to get into these very interesting, but somewhat more complicated questions with respect to the other plaintiffs.

THE COURT: I will ask you something about the purchaser standing in just a minute, but as it relates to the Braidwood self-insurance standing, you referenced the Little Sisters of the Poor case and the abortifacients and how Hobby Lobby did not have to show that someone was making a claim for those particular drugs that they objected to, but the government says that, statistically speaking, that someone, given the number of employees that Hobby Lobby had, someone was going to make a claim on that policy for those drugs.

MR. MITCHELL: Right.

THE COURT: That would require the insurance company to pay, Hobby Lobby to pay for that to be done. And that that statistical exercise isn't at play here?

MR. MITCHELL: Right.

THE COURT: You would agree with that?

MR. MITCHELL: I think that's a fair point by the government with respect to the empirical claim they're making, which is it's far more likely in a company like

Hobby Lobby, which has a very large number of employees, I think tens of thousands, and contraception which is much more commonly used than prEP drugs. It's obviously far more likely that Hobby Lobby would ultimately pay out for contraception that it found objectionable.

But that said, the Hobby Lobby decision doesn't discuss Article III standing at all. So I want to be careful not to lean too heavily on that. I think it also undercuts the government's argument as well.

We don't have a ruling from the Supreme Court on whether Hobby Lobby had standing or why Hobby Lobby had standing. It doesn't appear to me from reading the Court's opinion that this point by the government should make a difference because Justice Alito emphasized that a complicity-based objection has to be accepted by the Court as long as it's sincere.

It doesn't really matter whether the complicity-based objection is rooted in fact or reality. For example, Hobby Lobby claimed that certain contraceptives that the FDA approved acted as abortifacients. There are many medical experts who disagree with that as a scientific matter, but none of that was relevant in Hobby Lobby.

The mere fact that Hobby Lobby held the belief that this would make it complicit in the provision of abortifacient contraceptive had to be accepted, as long as

it was sincere. That's the question I think for the Court to ask here: Is the belief of our plaintiffs sincere?

No one's questioning the sincerity of our plaintiffs' -- of our clients' complicity-based objections. They may be questioning the empirical claims that our clients are making. And they may very well be right to call those into question. Maybe Dr. Hotze won't be paying out actual money from Braidwood for these prEP drugs.

But if he believes that the mere provision of coverage makes him complicit in something that violates his religious beliefs, and he has claimed that in his affidavit, and that is sincere, that's enough to show a substantial burden under this exercise.

And therefore, that's enough to show injury in fact because a substantial burden under RFRA is, by definition, enough to show Article III injury.

So again, I want to be careful with my reliance on Hobby Lobby. Hobby Lobby did not discuss standing, but Hobby Lobby did discuss the meaning of substantial burden, and a substantial burden is per se injury in fact under the Article III standing test.

THE COURT: Okay. If I can just get back to the argument that they're making about Braidwood having no standing because they're not likely to have to pay any money for prEP drugs.

And so, as an empirical matter, that may bear out, in your view. But you're saying this earlier Supreme Court case has said, for standing purposes, any trifle?

MR. MITCHELL: That's right.

THE COURT: And what would the Supreme Court define trifle to be?

MR. MITCHELL: I think they would define it as something that goes beyond a mere ideological grievance. So it has to be something that goes beyond the psychological harm that's incurred by the observation of conduct with which one disagrees.

It has to go something beyond this offends my belief system. It has to be something that affects you in a tangible and concrete way, even if it's very small.

So the fact that Dr. Hotze and Braidwood have to go in and tinker with their plan in response to these mandates from the government, that's enough to show standing. I realize that's a minor injury. You just have to change some words on a piece of paper, but you still have to do something.

And the fact that they had to do that act is enough to take them out of the role of what I would just describe as a mere ideological grievance and into the realm of where you actually have an injury in fact under the Supreme Court's test.

So we have identifiable trifle. I realize it may just be a trifle. They may not be paying out gobs of money for the prEP drugs or even have the right to say that, but they still have injury in fact, even if it's not financial injury.

THE COURT: Okay. And then, just on the purchaser standing. In their latest reply -- their last reply brief, they cite the litigation in the D.C. Circuit involving the AmTrak tickets and the arbitration clause.

And the government writes, it's not a quote, but they write in their brief that it appears that the D.C. Circuit is scaling back and limiting the purchaser standing doctrine to some degree. What's your take on that?

MR. MITCHELL: Yeah, it was hard for me to see from the D.C. Circuit's opinion where exactly they're trying to draw the line here. I may be misquoting, but they're talking about the essential attributes of the product, as opposed to something that's nonessential, like an arbitration clause.

Even if we were to assume that we can indulge that assumption for a moment, my plaintiffs are being deprived of the ability to buy health insurance unless they engage in conduct that, in their view, makes them complicit in conduct that violates their sincere religious beliefs.

If the purchaser standing doctrine is to be

accepted, it would at least have to include that, given the existence of federal RFRA. The federal law has recognized this, not simply as an injury in fact, but as a violation of federal law to have something that imposes on any person an obligation to engage in conduct that violates his religious belief, or in this situation, excluding them from the health insurance market entirely, unless they're willing to buy in and pool their money with others who are engaged in conduct that is contrary to their sincere religious beliefs.

Again, no one is questioning the sincerity of a client's complicity objections. That's the crucial point. Hobby Lobby says if complicity-based objections are sincere, they have to be accepted by a court, regardless of whether the Court agrees with them empirically or factually.

So it's true of all religions. Many people hold religious beliefs that nonbelievers would think are delusional, but the court can't come in and say, "Your religious beliefs are factually wrong. Therefore, you aren't substantially burdened in your exercise of religion."

THE COURT: Staying with the purchaser standing doctrine for a moment then, would you address for me, for the non-Braidwood plaintiffs, or I guess, Braidwood might be in there as well, the idea that there's no traceability for those plaintiffs under the purchaser standing doctrine.

In other words, there's no -- you provided no

evidence that either insurance companies will offer plans that meet these objections, and then the argument that there's no evidence that you're paying more for policies for your nonreligious plaintiffs.

MR. MITCHELL: Yeah, I think your Honor is right to point out that we haven't proven beyond a preponderance of the evidence that premiums would go up in the absence of preventive care mandates.

There are reasons to think that premiums might be affected -- I'm sorry, the premiums would go down in the absence of the preventive care mandates.

The empirical evidence is inconclusive on this point, which is why we didn't rely on it. We did rely on it at the pleading stage, but at summary judgment we actually mete out evidence. There wasn't enough out there, in my judgment, to argue to the Court that we could show, by a preponderance of the evidence, that the premiums would go down if the requested relief were granted.

It's just not clear. Some people think the premiums would go down, but it's largely speculative. And really, I don't think there's any way to know until the judgment that we are requesting would go into effect, and we would have to see what happens in response to that.

With respect to traceability, we don't have to prove in fact that these products would be offered with

respect to the requested relief. We just have to show that it's traceable. Not but-for causation. Just that the injury is traceable to the defendant's conduct.

And the fact that before the Affordable Care Act there were health insurance policies available that excluded contraception and they excluded prEP drugs and they excluded other things that are being required and covered by the Affordable Care Act is, in our view, more than enough to show traceability.

Because we know before the Affordable Care Act there at least were some insurance companies that weren't covering this. That's why the Affordable Care Act came in, to mandate the coverage of preventive care by everyone. So that's enough to show traceability on that theory.

Now, again, with respect to the premiums and whether those would fluctuate and go up or down, we didn't introduce evidence of that because we didn't think we could prove that by a preponderance of the evidence. There just wasn't solid proof, one way or the other, on what the effect on premiums would be.

That's why we're principally relying on Braidwood's standing, because we think that's the easier way to establish standing. Again, we still think we can get there with the other individual plaintiffs. We still think we can get there with the other individual plaintiffs, but

it's a somewhat tougher row to hoe.

THE COURT: I guess the reason I'm asking this question is it appears that post the DeOtte case, that there's not been a market, I guess, for insurance companies to offer these plans that would satisfy religious objections, at least in these preventive care mandates.

So, even if you get -- and I think that's part of their argument, that is, even if you get a result separate on the side of the religious plaintiffs, it's not going to achieve the result you want.

MR. MITCHELL: I don't -- I'm sorry?

THE COURT: So what you're seeking from me won't satisfy these standing elements, I don't know if you read the mask mandate case that came out last night from the Fifth Circuit, a 2-to-1 decision that talked about standing analysis when the effect would be on the third party.

Did you happen to read that?

MR. MITCHELL: I haven't had a chance to read it. I'm sorry, your Honor.

THE COURT: Well, take a look at that when you get a chance, but I do wonder about that. You got a judgment in DeOtte and it certified a class there of religious objectors to these mandates.

It appears -- and I don't know if you dispute that -- but it appears there's not been a market for

insurance companies to go and make these changes that would be permitted presumably post DeOtte. So what's your take on that?

MR. MITCHELL: I don't think it's fair, your Honor, with all respect, to rely on DeOtte against Azar to undercut our case here, because the remedy we asked for and received in DeOtte was quite narrow.

It was only for religious objectors. We were asking the Court to allow insurers to provide contraceptive-free coverage, but only to religious objectors.

And that is such a small, narrow slice of the market that it's unsurprising that insurance companies haven't responded to that in the way that I think the DeOtte plaintiffs had hoped.

Here, we're seeking much broader. We're asking the Court to enjoin the enforcement of the mandate across the board. Because, under the appointments clause claim that we're making, the entire contraceptive mandate is improper, invalid, and unconstitutional because none of these officers were constitutionally appointed.

That would have a dramatic effect on the health insurance market. And prior to the contraceptive mandate, only half of the health insurance plans offered it at the time -- I know it's not in the record so I probably

shouldn't be blurting that out -- with respect to the traceability point, the proper line of inquiry is how did the world exist prior, before the Affordable Care Act?

It was possible to obtain contraceptive-free health insurance before the contraceptive mandate. That's why they imposed the contraceptive mandate. If all the insurance companies were offering this on their own, there would be no need for a contraceptive mandate.

So that injury is traceable to the government's action because it's taken away on the market something that used to be available.

Now, your Honor's question, I think, is what would happen if the Court were to enjoin the enforcement of the mandate? Would contraceptive-free health insurance come back into effect?

And again, the test is, is it likely, as opposed to merely speculative, right, that the injury would be redressed by relief from the Court. It's certainly likely, because so many people just do not need contraceptive coverage.

People who are over the age of 45 don't need contraceptive coverage. People who aren't engaged in behavior that requires contraception don't need contraceptive coverage. That's a majority of the population.

Again, we've seen this before. We saw what the market looked like before the Affordable Care Act, and that's enough to just meet the rather minimal burden that we have to show that it's likely that the injury would be redressed.

But again, going back to Braidwood. With Braidwood, it's as clear as can be. The injury is obvious, the traceability is unquestioned, and the redressability. They don't have to change their plan, but that's the injury. That's easily redressed by the relief we are requesting from the Court.

So these are all, I think, very nuanced and somewhat interesting questions with respect to the other plaintiffs, but Braidwood's indisputable standing makes this, in our view, a rather easy case, once the Court acknowledges that the one-plaintiff rule kicks in.

Again, I understand it's a point we disagree with the government on, but as long as the Court can accept the major premise and minor premise, the syllogism I mentioned at the outset, all these other issues, even though they are very interesting, they just don't need to be resolved because they introduce, in our view, just needless complications in the case.

THE COURT: Where is DeOtte, by the way? Do you know?

MR. MITCHELL: Oh, yes, your Honor.

THE COURT: I'm just curious now.

MR. MITCHELL: It's an important question to ask. The Fifth Circuit panel reversed the Court's judgment in January. I think the Court is aware of that.

THE COURT: Right.

MR. MITCHELL: We petitioned for en banc rehearing at the end of January. We still don't have a ruling from the court.

THE COURT: I see.

MR. MITCHELL: So the mandate hasn't issued.

THE COURT: Right.

MR. MITCHELL: I was waiting for the mandate to issue to provide an update to the Court, because that would obviously affect the Court's res judicata holding. As of today, the Court's res judicata holding is still sound because the DeOtte judgment is still in effect.

THE COURT: Right.

MR. MITCHELL: Because we petitioned for a rehearing en banc, that delays the issuance of the mandate. We will let the Court know, though, as soon as the mandate issues or if they grant the hearing en banc, which would further delay it.

THE COURT: Exactly. So if they do not grant a rehearing en banc and they issue the mandate reversing the

case, then I would need to reconsider the res judicata issue?

MR. MITCHELL: I believe so, yes.

THE COURT: And what is the effect of your amended complaint, taking out those other details in there?

What is the effect of that?

And does that affect standing in any way?

MR. MITCHELL: I do think having read the government's reply brief that -- and I did not at the time believe we had prejudiced them in any way with what we had done -- but they have claimed in their reply relief that they would have wanted to seek discovery from our plaintiffs about the sincere religious objections to the other non-prEP drugs and noncontraception issues.

So I do agree with the government at this point because they have a certain prejudice that the Court should not breach our RFRA claims outside the prEP mandate and the contraceptive mandate.

Claims do evolve throughout a case. I hope we didn't cause needless complications with some of the shifting that we did throughout the litigation, but sometimes clients -- claims will evolve as the case proceeds.

And sometimes claims are removed and sometimes, in this case, an attempt was made to bring those back to life.

But given that the government has claimed prejudice from their inability to take discovery, we would agree and respectfully withdraw the RFRA claims that do not extend beyond -- I'm sorry -- we would withdraw the RFRA claims that extend beyond prEP drugs and the contraceptive mandates, which the Court has ruled on with respect to res judicata. But given the possible complication with DeOtte, that may come back to life if the mandate issues in the Fifth Circuit.

THE COURT: Okay. Just the last question here. You cite this Duke Law Review, one good plaintiff --

MR. MITCHELL: Yes.

THE COURT: -- is enough or not enough?

MR. MITCHELL: Not enough.

THE COURT: Yeah.

MR. MITCHELL: Obviously, I don't agree with the thesis of the article.

THE COURT: Yeah.

MR. MITCHELL: But I was citing the article for the appendix that it has at the very end, which lists the impressive array of authority behind the one-good-plaintiff rule, even though the author was criticizing it.

THE COURT: Right.

MR. MITCHELL: So while I acknowledge his criticism, it is an academic law review article that does

not have binding authority.

What is binding are the cases that were cited in his appendix, and that's what we're primarily relying on, notwithstanding his criticism of the rule, but it is clearly the law that the Supreme Court endorsed in Little Sisters.

THE COURT: Yeah.

MR. MITCHELL: I don't think we can do any better than that in terms of showing the current related ruling, despite some objectors that exist in the academy.

THE COURT: Okay. Very good then. So you want to turn it over to your colleague and then come back to the merits?

MR. MITCHELL: Yes, please. Thank you.

MR. LYNCH: Thank you, your Honor.

THE COURT: Thank you. Yes.

MR. LYNCH: The ultimate point on standing is that it's a summary judgment and the plaintiffs must demonstrate with evidence an actual or imminent injury caused by the conduct complained of and it's redressable by the Court; it's their burden.

And plaintiffs, at this point, have no evidence beyond declarations that what they object to -- or that they object to some of the coverage. That's it.

You know, three of the plaintiffs, Kelley -- John Kelley, Kelley Orthodontics, and Joel Starnes don't

participate in the health insurance market at all for reasons unrelated to this lawsuit. So they don't have standing.

Two other plaintiffs, Zach and Ashley Maxwell, have failed to establish that their injury was caused by defendant's actions or redressable by the Court because they have no idea, they say, whether their health plans would include the objected-to coverage, even absent the challenged requirements.

And as your Honor pointed out, both the Fifth Circuit and the Supreme Court say that more of a showing is required when the standing depends on the actions of third parties not before the courts, like insurance companies, rather than less than here.

And here, the plaintiffs have made no showing that they would be able to obtain their desired insurance without these coverage requirements.

And indeed, it wouldn't be redressable anyway, because as plaintiffs concede, their appointments clause claims do not reach the guidelines as they were before the Affordable Care Act was implemented.

So if, for example, there was an HPV coverage recommendation in effect, and I believe it's 2007, but before the Affordable Care Act was passed. And so, essentially, there's no appointments clause issue because

Congress recognized, when passing the Affordable Care Act, that those guidelines would be covered and in effect even under plaintiffs' theory.

Any plaintiffs, to the extent that they have an objection that is not grounded in their religious beliefs but is grounded purely in the economics or just having coverage that they don't want or need, for whatever nonreligious reason, your Honor was right to point out that we referenced the Weissman decision in the D.C. Circuit.

And what that decision makes clear is that, under this purchaser standing doctrine that plaintiffs rely on, a plaintiff may have standing if the government action rendered a consumer's desired product, as defined by its core features, not readily available and whether it rendered the product unreasonably priced.

My friend conceded just now that they can't show that health insurance was rendered unreasonably priced by the actions they challenge. And it is, I think, certain that health insurance, as defined by its core features, is still available. Their allegation is that they can get health insurance that covers more than they want, rather than less.

So health insurance is still available to them. It's just a question of the exact, you know, peripheral features in the product that, you know, they will get health

insurance with things that they don't want to use, as well as things that they do. So I don't think, to the extent they have nonreligious objections, any plaintiff has standing, given Weissman.

The last issue, since my friend relies on Braidwood specifically, because Braidwood is self-insured, that means it doesn't pool risk with other insurers, and it can't claim to be supporting payment for prEP for individuals who are not Braidwood employees or their insureds -- their covered insureds.

And when the -- the complicity argument that Braidwood makes, their allegation is that, by covering certain services, they are facilitating acts by people -- other people that they disagree with.

But if no one ever claims these insurance benefits, if no employee or their insured says -- their dependent says, you know, we need prEP drugs, then Braidwood is not facilitating any acts, by their own theory.

You know, to have complicity based on certain acts, somebody who's linked to Braidwood has to be engaging in those acts. And Braidwood has not made any showing whatsoever that that's likely to happen or going to happen.

PrEP at the time of the requirement was used by less than one-tenth of a percent of the American people. Braidwood has 70 employees.

Mr. Mitchell was right to note that the Hobby Lobby case that he talks about is not a standing case. So it doesn't -- that was never disputed whether people would be -- whether Hobby Lobby could make a showing that their employees would use those drugs -- use the drugs in question there, because I think it was a given that somebody would, given the number of employees, but that showing is not made here by Braidwood.

And I think that the standing question really comes down to have they provided evidence that they will actually, in the way that they have said, that their complicity that they object to, will that actually be implicated by that? And I think they can't show it. They haven't shown it. So I will rest there.

THE COURT: Would an insurance company, Aetna, would Aetna be able to challenge this mandate?

In other words, would Aetna be able to come in and say, we offered all these policies before the ACA or before the mandates came into place, we would like to continue to offer some of those policies, we think the appointments clause and the vesting clause and the delegation doctrine are bad here, would they have standing, an insurance company?

MR. LYNCH: They might. It would certainly depend on what injury they were specifically claiming. The issue

here is really about what plaintiffs have shown with their evidence on summary judgment and met that burden.

I think it would be possible that an insurance company could, depending on the claimed injury, conceivably meet that burden.

THE COURT: What would they have to show?

So if they came to you and they said, before all these mandates went into place, we offered these policies and we made good money on these policies, and we would like to continue to offer these policies to anyone who might want to purchase them, what else would they have to show to you?

MR. LYNCH: I think they would have to show that in some way the failure to be able to offer these policies has hurt their business. I mean, I think that their injury would likely be an economic one.

And presumably Aetna could show, based on their internal accounting, and that would be, I think, the path that they would take. But again, without having the claims that they have made and specific allegations, what they would do and what they have to do is hard for me to say. It's speculation.

THE COURT: And what is your take on Mr. Mitchell's argument that the Supreme Court has said even a trifle is sufficient injury for standing purposes?

Let me just ask you this. Set injury aside. For

Braidwood and for Braidwood's self-insurance argument, if they have an injury, if they have an injury, do you agree that redressability and traceability would be met by them?

MR. LYNCH: I think that's likely correct, your Honor.

THE COURT: Okay. And so, it sounds like Mr. Mitchell is making the argument that the federal government has made Braidwood make these changes, and that this footnote in this opinion in 1973 says that is a sufficient injury. It's something more than a mere trifle.

What's your take on that?

MR. LYNCH: I think here they've alleged and claimed and put into evidence what they claim their injury is. And their claim is that it's because of a religious objection to being complicit in behaviors that the Braidwood principal, Dr. Hotze, doesn't agree with.

That's been their argument. That's what Dr. Hotze says in his declaration. He's not claiming that he's injured by changing his plan. This is new as of today.

The declaration says, "I'm complicit by supporting behaviors that I don't agree with" and to actually support those behaviors, yes, they have some evidence that he's supporting those behaviors that someone is going to take advantage of this.

They just haven't showed any evidence that any

employee or prospective employee intends to avail themselves of these services at all.

THE COURT: Do you understand their self-insurance process? I don't. I'm asking you.

MR. LYNCH: Vaguely, your Honor.

THE COURT: And so, my question to you is, if they have an employee that might utilize prEP drugs, would Braidwood be notified of that, or would their third-party claims administrator simply pay it because it is covered under their policy?

MR. LYNCH: So that, I don't know for sure, your Honor. I would have to defer to counsel and Braidwood about that.

THE COURT: Okay. And what is your take on counsel's argument that, so long as all of the plaintiffs are seeking the same relief, then standing exists?

What is your take on that and the cases that they cite and the arguments -- of course, the Law Review article criticizes this article, but it does list --

MR. LYNCH: Right.

THE COURT: -- as counsel suggested, lists, you know, an impressive list of cases that say this.

MR. LYNCH: Yeah. So I think that I would put it differently than Mr. Mitchell did. If one plaintiff has standing, your Honor can reach the merits of any claim that

that plaintiff has.

That doesn't mean that the other plaintiffs have standing or, you know, if -- specifically with the RFRA claim, where the relief would be an individual exception to some rule. If a plaintiff doesn't have standing, they can't obtain relief.

The constitutional claims are different, in that your Honor could reach the merits of the constitutional claim if one plaintiff has standing and, you know, enjoin coverage or enjoin the rule. But it's not that every plaintiff has standing; it's plaintiff and injury-specific, claims-specific.

THE COURT: Okay. All right. Thank you.

MR. LYNCH: Thank you.

THE COURT: Do you want to reply and then move to the substance?

MR. MITCHELL: Your Honor, I can reply if you have questions. But if not, I think I'm content to move on to the merits, if that works for you?

THE COURT: Very good.

MR. MITCHELL: And your Honor, I will begin with the appointments clause, if I could. That's where I will spend the bulk of my time.

The fundamental constitutional problem with the preventive care coverage regime is that it empowers

individuals who have not been appointed in conformity with the Constitution to unilaterally decree that preventive care all private insurers must cover.

This indisputably qualifies as an exercise of "Significant authority pursuant to the laws of the United States." And it therefore requires that these individuals be appointed in conformity with the appointments clause as officers of the United States.

The government has offered many ways in its briefing to mitigate or obviate these appointments clause problems, but none of them hold water at the end of the day.

I would like to go through the arguments, if I could, one by one that the government has offered. And let me begin with their, what I will call, ratification argument.

And this is the idea that Secretary Becerra has taken care of any appointments clause problems that might have existed in the initial promulgation of these preventive care mandates because he issued a memo in January of 2022 that purports to ratify the previous edicts that have been issued by ACIP, HRSA, and the Task Force.

Now, this doesn't fix the problem for two reasons. Number one, the Secretary just has no authority under the statute or any other source of law that we've been able to find to ratify or reject the preventive care mandates that

have been imposed by the Task Force or by ACIP or HRSA.

Section 300gg-13(a)(4), one through four, compels the Secretary to implement their decisions whether he approves of them or not.

And that's what distinguishes this case from Guedes against ATF, the D.C. Circuit case the government relies on heavily throughout their brief.

Because the Attorney General's authority to ratify in that case was "Unquestioned." That is not the situation here.

The statute vests the authority to determine the scope of preventive care coverage with the Task Force and with ACIP and with HRSA. It does not authorize the Secretary of Health and Human Services to review or in any way countermand their decisions.

Now, the government tries to rely on a statute codified at 42 U.S.C., Section 202. They claim that the statute somehow authorizes the Secretary to override the decision to make up HRSA and the Task Force. But I would like to read the statute to the Court. I don't know whether your Honor has it in front of you?

THE COURT: I don't.

MR. MITCHELL: I did not bring a hard copy with me.

But here's what it says, "The Public Health

Service and the Department of Health and Human Services shall be administered by the Assistant Secretary for Health under the supervision and direction of the Secretary."

So I will read this again. "The Public Health Service and the Department of Health and Human Services shall be administered by the Assistant Secretary for Health under the supervision and direction of the Secretary."

Now, what this statute says is that the Public Health Service, which includes ACIP and HRSA -- it does not include Preventive Services Task Force. The Public Health Service is administered by the Assistant Secretary for Health, and that the Assistant Secretary for Health is, in turn, supervised and directed by the Secretary for Health and Human Services.

It does not say that the Secretary supervises and directs the Public Health Service itself. The Secretary supervises and directs the Assistant Secretary for Health who, in turn, administers -- it doesn't say rules over or vetoes or countermands -- administers the Public Health Service.

So the Assistant Secretary for Health is just an administrator. It's not a ruling official that can countermand decisions of the Affordable Care Act, specifically and exclusively vests in ACIP, HRSA, and the Task Force.

And how can the Secretary's ratification argument be squared with the text of 42 U.S.C., Section 299b-4, which says, and I've quoted this before in our briefing, "All members of the Task Force convened under this subsection and any recommendations made by such members shall be independent, and to the extent practicable, not subject to political pressure."

This is clearly a regime that is designed to insulate the decisions of the Preventive Services Task Force from political interference and giving the Secretary the power to override or veto the Task Force recommendations at will is incompatible with the political independence secured by Section 299b-4. The Task Force is not part of HHS. The Secretary has no authority to overrule its decisions.

The second and more serious problem, though, with the government's ratification argument is that it would still violate the appointments clause for ACIP and HRSA and the Task Force to impose preventive care mandates on their own, even if those decisions can later be reversed or countermanded by the Secretary.

And here's why. They're still given the power to impose preventive care mandates, which will remain in effect until the Secretary gets around to weighing in on the question. That is still significant authority pursuant to the laws of the United States.

On top of that, the Secretary cannot, even on the government's view -- and the government should correct me if I'm mischaracterizing their position -- but the Secretary cannot override a decision not to impose a preventive care mandate by ACIP, HRSA, or the Task Force.

Their assent is a necessary condition for a preventive care mandate to be imposed even on the government's ratification theory.

If they don't propose or recommend something, the Secretary can't impose it on his own initiative. So they still wield significant authority under the laws of the United States because they can impose the preventive care mandate before the Secretary weighs in.

And secondly, they still have this vetogate power. If they don't approve a recommendation, the recommendation cannot take effect, even if the Secretary or the President or someone higher up on the food chain wants it.

So coming or going, they are exercising and wielding significant authority pursuant to the laws of the United States and they must be appointed as officers. Even if we accept this ratification idea, which I certainly don't accept, but even if this Court were to indulge the possibility of ratification by the Secretary, it doesn't cure the appointments clause problem.

The government does not have a good answer to this

point in its reply brief. You still need to be an officer of the United States, even when you are temporarily imposing preventive care mandates that might later be reversed by the Secretary.

And you still have to be an officer of the United States when your approval is a necessary condition for a preventive care mandate to go into effect.

Now, this is unquestionably significant authority pursuant to the laws of the United States. And Lucia proves as much, because it holds that administrative law judges are officers of the United States, even though the decisions of an administrative law judge can be reviewed and reversed by an agency on appeal. So that's the issue with respect to ratification.

The second big point the government makes is this question about, what's the remedy? So if one assumes there is an appointments clause problem, what should the remedy be?

And the government claims that we are seeking an improper remedy. They're claiming the Court should enjoin the defendants from enforcing the preventive care mandates because they were issued by individuals who were not appointed consistent with Article II.

The government says that's not the proper remedy. What the Court should instead do is issue some type of

ruling, and I'm not sure how this would take effect, but the Court should somehow decree that the Secretary of Health and Human Services can countermand the decisions of ACIP, HRSA, and the Task Force, thereby curing the so-called appointments problem.

Well, let's start with the first and what I think is the most serious problem in this proposal, and this is the point I've already made, a regime in which the Secretary of Health and Human Services ratifies or countermands the recommendations of ACIP, HRSA, and the Task Force, still violates the appointments clause for the reasons I've said previously.

Number one, ACIP, HRSA, and the Task Force are still wielding significant authority pursuant to the laws of the United States because their recommendations take effect without the Secretary's approval, even if the Secretary can later decide to ratify or reverse the decision.

Number two, the approval of the ACIP, HRSA, and the Task Force is necessary for a preventive care mandate to take effect, even under this regime imposed by the government.

So they're still wielding significant authority pursuant to the laws of the United States and that clearly follows from the Supreme Court's holding in Lucia, because the administrative law judges were still held to be officers

who had to be appointed consistent with Article II, even though their decisions were reviewed and possibly reversed -- subject to reversal by some superior who was higher up in the food chain.

The government relies heavily on Arthrex from the Supreme Court's decision two terms ago. The situation in Arthrex was very different, because the Court's remedy in that case made every decision by the administrative patent judges reviewable by the director of the Patent and Trademark Office, and that's regardless of which direction the decision took. All right?

In this case, there is no way for a principal officer to override a decision not to enact or recommend new coverage mandates.

What the government is describing in this regime in which ACIP, HRSA, and the Task Force make recommendations, those recommendations can be reversed later by the Secretary, but the nonrecommendations can't.

They're not proposing a regime where the Secretary gets to come in and say, we're going to impose this preventive care mandate against the wishes of HRSA or against the wishes of ACIP or against the wishes of the U.S. Preventive Services Task Force.

There's another big difference in this case in Arthrex. There was no dispute in Arthrex that the

administrative patent judges were improperly appointed as inferior officers in a manner consistent with Article II.

That's not the situation here, because there is no statute that vests the appointment of the ACIP members or the HRSA members or the U.S. Preventive Services Task Force Services members in the President alone or in the courts of law or in the heads of department.

For an inferior officer to be appointed consistent with the Constitution, Congress must, by law, vest that appointment in the President alone or the courts or the heads of department. There has to be a statute. And the government hasn't pointed to one yet that can qualify under Article II.

Here's the second problem with the government's proposed remedy. Courts do not have the power to invent new statutory powers as part of a judicial remedy. They can't rewrite a statute. They have to award declaratory or injunctive relief between the named litigants.

There are currently preventive care mandates in effect. My clients are claiming that these mandates are unlawful because they were imposed by individuals who are not appointed as officers of the United States.

If the Court agrees with us, the only permissible remedy is to restrain the defendants from enforcing them until Congress changes the statute to fix the appointments

clause problem.

The Court can't make the decision for Congress about how the appointments clause problem can be fixed. The Court's job is to give relief to my clients that will address their injuries, and then allow the political branches to decide how to respond.

The Court does not have the prerogative to give new powers on agency officials that Congress has not confirmed.

The third problem is a remedy that's issued by this Court has to redress the injuries that the plaintiffs are alleging. Otherwise, it's an advisory opinion. The Arthrex-like remedy that the government proposes does not do that.

My clients are alleging injury in fact from the imposition and enforcement of the preventive care mandates. The government's proposed remedy will leave that injury in place.

And if the Court were to issue that remedy after finding the violation of the appointments clause, it would be issuing an advisory opinion because it would not be ruling on the Constitution in a way that redresses an injury that the plaintiffs have asserted.

My clients would still remain subject to the preventive care mandates. The injuries they alleged would

still be in effect. And the Court would not have addressed the injury in any way, shape, or form. So Article III, in our view, prevents that remedy that the government is proposing.

The third big issue the government raises in its brief, it claims there was never an appointments clause problem in the first place and suggests that all of the relevant players were appointed in a manner consistent with Article II: the members of ACIP, the administrator of HRSA, and the members of the Task Force.

So I'll go through each of those three entities one by one, with the Court's permission. Let's start with ACIP. The government relies on the fact that the CDC director is constitutionally appointed, which he is, and it then relies on the fact that ACIP advises the CDC director.

This argument would have worked before the enactment of the Affordable Care Act when ACIP was truly an advisory committee.

It doesn't work when the Affordable Care Act gives ACIP power to dictate the immunizations that private insurers must cover. The members of ACIP have become principal officers once President Obama signed the Affordable Care Act into law, because Section 300gg-13(a)(2) requires that the recommendations -- so-called recommendations -- take effect without subjecting their work

to the direction or supervision of a principal officer.

But even if we accept the government's claim that the CDC director can ratify and override and countermand the ACIP recommendations, the ACIP members still qualify as principal officers because an ACIP recommendation, as we said before, is necessary for any immunization coverage requirement to take effect.

There's no statute anywhere that we can find that allows a principal officer to override an ACIP refusal to recommend a vaccine or an immunization.

And then finally, even if the members of ACIP somehow were named inferior officers rather than principal officers, their appointments remain unconstitutional because the government has not identified an act of Congress that vests those appointments in the President alone or in the courts of law or in the heads of department.

The government tries to rely on 42 U.S.C., Section 217a, but this statute does not work because it authorizes the Secretary to make appointments to "such advisory councils or committees for the purpose of advising him in connection with any of his functions."

ACIP can't be considered an advisory committee anymore because it's been given powers by the Affordable Care Act to give its so-called recommendations binding force. That's not advice. That is an edict. That is an

exercise of actual government power.

So 217a will not salvage the appointments clause problem. It will not qualify as an act of Congress that vests the appointment of these ACIP members in the Secretary alone because, again, it only allows the Secretary to appoint advisory committees, which ACIP was prior to 2010, but no longer is.

On HRSA, the administrator of HRSA is a principal officer for the exact same reasons, right? It's empowered by the Affordable Care Act to unilaterally determine the preventive care that private insurers must cover.

And these preventive care recommendations are not, under the text of the statute, subject to the direction or supervision of the Secretary or any other principal officer.

Now, again, the government tries to respond by arguing that the Secretary really does have power to countermand HRSA's decision making. So if HRSA recommends contraception coverage, the government claims that the Secretary can override that.

Even though it's not explicit in 300gg-13(a)(4), the government claims that that is implicit based on background principles of administrative law and other statutory provisions.

Again, even if one were to assume that, and again, we don't assume that, the plaintiffs, but even if the Court

were to assume that for the sake of argument, the director of HRSA is still a principal officer because, number one, the recommendations of HRSA still take effect before the Secretary gets around to deciding whether to ratify it.

And number two, the recommendation of HRSA is still a necessary condition for a preventive care mandate to take effect. For there to be a contraceptive mandate, the director of HRSA must go along with it.

If there's no recommendation from HRSA, there's no authority vested in any other person in the government to impose the contraceptive mandate against the wishes of the HRSA administrator.

That is the power held of a principal officer. It's not subject to review or override. Even if one accepts the government view that the recommendations can be overridden, the nonrecommendations can't. So same problems with ACIP.

Now, moving on to the Task Force. Here's where the government, in our view, really runs into problems with the U.S. Preventive Services Task Force. Here's the Task Force officer of the United States under Lucia, number one, it must "occupy a continuing position established by law; two, it must exercise significant authority pursuant to the laws of the United States."

The U.S. Preventive Services Task Force, the

members clearly occupy a continuing position established by law. Just look at the statute, 42 U.S.C., Section 299b-4 (a)(1). It says, "The director shall convene an independent preventive services task force to be composed of individuals with the appropriate expertise."

All right. So there's a statute that requires that a task force be established, and that its members be populated by experts, and that it be convened by the director of ACIP.

So there is a statute that establishes this position. It's established by law, continuing position established by law.

And then the statute goes on to describe the duties of the task force, the agency's role in supporting the work of the task force, independence from political pressure.

And then, of course, the provision in the Affordable Care Act that gives the task force the power to determine the preventive care that all private insurers must cover.

So the only remaining question is whether that's significant authority pursuant to the laws of the United States. And if that's not significant authority pursuant to the laws of the United States, it's hard to imagine what could be.

This is an entity that can, by unilateral decree, tell every private insurer, both the self-insured plans and the plans offered by insurance companies, what they must cover at no cost to the beneficiary, without co-pay or deductible.

And again, even if we assume the possibility of a veto power in the Secretary, there's still significant authority wielded by the Task Force.

It's almost like the relationship between the Congress and President, which is how I understand the government's ratification argument.

The Task Force makes recommendations. The Secretary can override the recommendation in an act akin to a presidential veto, but the Task Force still has to make the recommendation before it can take effect.

There's still significant authority vested in that Task Force, even if there is this later ratification by the Secretary. And again, the nonrecommendations can never be reviewed because there's no statute that empowers the Secretary or the President or anybody else to impose a preventive care mandate absent a recommendation from the U.S. Preventive Services Task Force.

So again, that's our presentation on the appointments clause. Your Honor, if I could just briefly address nondelegation and RFRA?

With nondelegation, we have seen from the Supreme Court some hints, perhaps one could say trying to read the tea leaves, with some interest in possibly revising the nondelegation doctrine.

The government is suggesting that it really should be the Supreme Court's prerogative if they want to breathe new life into the doctrine to do so, given the language that we saw in Little Sisters of the Poor.

The government may very well be right, there has been, at least from 1935, no decisions from the Supreme Court that have declared a federal statute unconstitutional for failing to provide an intelligible principle. I don't see any intelligible principle in the statute whatsoever.

So unless the Court is willing to acknowledge that there simply is no nondelegation doctrine or that everything qualifies as an intelligible principle, it's hard for us to understand what the intelligible doctrine would be, because there's nothing in the statute that purports to direct the Task Force or HRSA or ACIP in their discretion. It just seems to be trusting these entities to exercise their discretion the way that will be consistent with the public interest.

Courts have been very aggressive in reading in intelligible principles in the statutes. That may be the approach the Court might want to use here.

But I think the acid test would be, what would be an unlawful use of this delegating power?

The statute defines the boundaries of the power by saying, it has to be preventive care, or in some cases, (a)(4) preventive care for women. And in (a)(2), it has immunizations or vaccines. That defines the boundaries of the delegated power, but there's nothing that actually says how that delegated power should be exercised within those boundaries. That's what an intelligible principle is. It's something that tells the agency, how do you use your discretion.

So again, it may be proper to leave this to the Supreme Court to let them decide whether they want to start reviving the nondelegation doctrine in any way, shape, or form.

But the judicial test in the nondelegation is leading to statutory enactments like this, where Congress doesn't even try to tell the agency what it should do, not even a statement regulating the public interest, or do so according to sound health policy, not even in bromides and platitudes.

So again, courts may try to read that into the statute; some courts have done so. But maybe it's up to the justices to ultimately take the first step here.

On RFRA, I just want to return to the point I made

earlier about standing. The court has to accept complicity-based objections, as long as they're sincere.

The government in their brief is attacking some of the factual assertions that our clients are making with respect to their alleged complicity and conduct that violates their religious belief, but that's not the role of the Court.

If the client says that this makes me complicit -- I'm sorry. If the plaintiff says, this makes me complicit in conduct that violates my religious belief, the question for the Court to resolve is only whether that complicity objection is sincere.

It's possible for a complicity-based objection to be so delusional that it might lead the Court to question the sincerity of the objection, but the government is not making that claim. I don't think that's a plausible way to characterize what our clients are asserting.

Dr. Hotze believes that providing this coverage makes him complicit in conduct that violates his religious belief. The Court has to accept that, unless he thinks Dr. Hotze is lying.

He's presented a sworn affidavit that explains his complicity-based objections in detail. That affidavit is unrebutted.

Again, the government is not questioning the

sincerity. They're just questioning factually whether his beliefs are correct.

Just like in Hobby Lobby, that's not the role of the Court. It's not for the Court to say, Hobby Lobby, you think this is an abortifacient but you're wrong to think that.

The question for the Court is, is Hobby Lobby sincere in thinking that this actually is an abortifacient, and is Hobby Lobby sincere in believing that this complicity in abortifacient contraception is contrary to its religious beliefs. Nothing more than that. And then a substantial burden is established.

And then from there, we believe the RFRA argument just flows naturally from Hobby Lobby, because there's obviously a less restrictive means of providing this universal coverage that the government is trying to obtain by commandeering Braidwood Management's health plan to provide the coverage. For example, the government could provide it just like they did provide it in Hobby Lobby.

So if you have questions?

THE COURT: Just in terms of the appointments clause arguments and your colleague's response to that, their argument seems to me is that there is a well-accepted general understanding of the structure of government and the structure of these agencies.

And their argument, and they cited a Supreme Court case that says that Congress will specifically change that structure -- if they change that structure, it will specifically do so.

And that these provisions (a)(1) through (4), whichever ones apply, don't specifically change that structure.

And so, that background understanding of the structure of government and the structure of agencies should be read into the statutes.

MR. MITCHELL: Yeah. Even if they're right to say that, and I don't think they are, but even if they were right, you still have to deal with the problem of Lucia.

Because, in Lucia, the administrative law judge was subject to review by his superiors. He was still considered an officer of the United States. He still had to be someone who was deemed -- he still had to be appointed consistent with the requirements of Article II. Now, that was an inferior officer, not a principal officer.

The second problem that they have to confront is that they are acting as principal officers because, under the statute, they still have to recommend coverage of preventive care before a mandate of preventive care can take effect.

So even if one were to accept the idea that the

Secretary can veto their recommendations, I don't see how the government can get around the problem that their recommendation is still a necessary condition for the preventive care coverage mandate to take effect.

I also don't know how they can get around the problem that the recommendation itself allows the mandate to take effect even before the Secretary has weighed in on it.

So we can indulge the assumption perhaps, so the secretary can overrule a recommendation or ratify it 10 years later, as Secretary Becerra has done, but that doesn't in any way, in our view, cure the appointments clause problem, because they are still wielding significant authority pursuant to the laws of the United States.

And they are wielding that authority without supervision, because the recommendation takes effect immediately, without approval from one of their superiors.

And there's just no way, under the statute, for a mandate to take effect if they don't sign off on it. So they essentially are acting as a veto here. And they have to be appointed officers for that to happen.

THE COURT: In their footnote, they cite an example of the CDC director imposing a recommendation related to COVID that the FDA recommended should be imposed in the way she wanted it imposed.

What's the difference?

Is it statutory language between the two?

MR. MITCHELL: They did mention it, I think -- is this the example of the COVID booster shot that ACIP recommended and the CDC nixed? Is that what it was?

THE COURT: Right. It's either that or it's the reverse.

MR. MITCHELL: Okay. Right. So could I respond to that situation first, if I could?

THE COURT: Yes.

MR. MITCHELL: So ACIP recommends a booster shot or something to that effect, the CDC director vetoes it. The question then would be, is that consistent with the statute, because the statute seems to say what ACIP says goes, right?

So it's not clear to me the CDC director has that authority. But even if one were to assume the CDC director had it, ACIP is still exercising significant authority pursuant to the laws of the United States.

Because even though its recommendation didn't take effect in that particular situation it has in other situations. And its recommendation is still needed under the statute for any preventive care mandate to take effect under the Affordable Care Act.

Now, there may be other sources of authority for these mandates to be imposed, but under the Affordable Care

Act, as written, ACIP has to make the recommendation before private insurance is required to cover it as a vaccine with no co-pays.

THE COURT: Okay. Okay. Very good. Anything else?

MR. MITCHELL: Nothing further, your Honor. Thank you.

MR. LYNCH: So we will start with the appointments clause, your Honor. The premises of plaintiffs' argument is that the preventive services provision, that's unreviewable authority outside the regular structure of HHS in these entities, but there's no language in the statute that says that.

The other statutes, 42 U.S.C., 202, which my colleague just mentioned, the reorganization plan which we cite in our brief which was adopted by Congress, all of these things and the principles of administrative law set out how HHS works.

If the Secretary has authority over the whole department, flowing down, they can direct and supervise the administrator of the Public Health Service. The CDC and HRSA specifically are in the Public Health Service.

And as he acknowledges, the CDC director and the HRSA administrator are officers of the United States that are properly appointed.

The HRSA administrator sets out the guidelines or accepts the guidelines. The CDC director accepts the ACIP recommendations for them to take effect as the statute requires coverage if the recommendations are in effect.

So inferior officers of the United States, who are properly appointed with respect to clearly the HRSA administrator and the CDC director, are the people who are calling the shots for provisions in subsections, what is it, (a)(2) through (a)(4).

I don't think there's any reasonable question about that. The Secretary has the authority to directly supervise them in turn. So the Secretary's ratification, if it were even needed, ends the appointments clause claim on the merits. That's what the Guedes and other decisions say from the D.C. Circuit that we talk about.

The Fifth Circuit in Willy vs. Administrative Review Board made clear the Secretary has ample authority to appoint inferior officers and delegate final decision-making authority to them under 5 U.S.C., Section 301 in a reorganization that is identical to the one that governs Public Health Service here.

So the plaintiffs talk about sort of what happens after, if the Secretary chooses not to ratify. That's really not the point here. The recommendations and guidelines would be properly in effect if the Secretary

didn't choose to ratify, but the Secretary has the authority to do so and that ends the claim.

He doesn't point to any authority for the claim that the administrative process can't start with nonofficers. I don't see why it couldn't. They make recommendations. They're accepted. They are discussed internally. They're rejected. That's how the administrative process routinely goes.

As far as the present Preventive Services Task Force goes, it's a little more complicated. As my colleague noted, the Task Force itself is outside of HHS. They're a nongovernment body.

I think the easiest -- they're volunteers. They're volunteer doctors. I think the easiest path for the Court to resolve this is that Section 42, U.S. Code 299b-4(a)(6) provides that recommendations made by the members of the PSTF shall be independent, and to the extent practicable, not subject to political pressure, which the Secretary can -- it admits that there's some aspect of political participation that can be involved. It's just, to the extent practicable, they're not to be subject to political pressure.

So here, the Secretary, by ratifying their guidelines and recommendation, I don't think it runs afoul of that requirement. It's not imposing new obligations or

pressure on them. Then this is not a case where the question is, well, did the Secretary impose an improper degree of pressure? That would be another case.

But even, regardless of whether the -- the Secretary's ratification is sort of the easiest path, and if your Honor believes you need to sever the independence prong of that statute in order to allow the PSTF to be directed and supervised more properly by the agency, that's another way to get there.

But regardless, PSTF members aren't federal officers under the binding law of this circuit, the Supreme Court precedent, or the OLC opinion that plaintiffs have cited in their brief.

The Fifth Circuit in Riley sitting en banc requires a formalized relationship of employment with the United States government for an individual to be an officer of the United States.

PSTF members undisputedly do not satisfy this criterion. They're not employees. They're volunteer doctors. The OLC memo says that federal office involves necessarily the power to legislate, to execute the law, or to hear and determine judicially submitted questions.

I think, as we noted in pages 43 and 44 of our opening brief all the cases cited where any court -- by either party -- where any court weighs in on what is an

officer basically has a reasoning that is consistent with the Fifth Circuit's employment or the OLC memos legislate, execute judicial power.

The PSTF doesn't do that. All they do is make recommendations about what is a medically acceptable standard of care. They are specifically limited by statute to review any scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the healthcare community.

And then Congress has decided -- Congress, who has the authority to regulate the insurance markets, has said they have adopted these regulations -- or these recommendations as binding on insurance companies.

PSTF is not charged in any way with making decisions about insurance or thinking about insurance. Their job is just to make these medical recommendations. And that's, you know, set forth in the statute that governs their actions.

Let's see. As far as sort of the timing of the Secretary's ratification. You know, at this point, the Secretary has ratified every single currently-in-effect recommendation under this provision.

So the plaintiffs don't have standing to raise what would happen in a future case if the Secretary decides

not to ratify. That's just not before the Court right now.

On the vesting clause, which my colleague didn't mention, it's largely the same as governing the PSTF, but there's one specific claim that he makes in his briefing, and the cases that he relies on are about the insulation from removal of different entities.

And there's no protection from removal that applies to PSTF members. He doesn't point to one. So that premise is wrong, and those cases don't apply to the PSTF.

On nondelegation, the plaintiffs' nondelegation claim is precluded squarely by the Fifth Circuit's decision in Big Time Vapes. There, they write, "Delegations are constitutional, so long as Congress lays down, by legislative act, an intelligible principle to which the person or body authorized to exercise the authority is directed to conform."

And specifically, when talking about what the intelligible principle is, they say, excuse me, "It is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of delegated authority."

And this language is particularly important -- that's at pincite 441 in the Big Time Vapes case -- because my colleague here has suggested that setting boundaries is different than setting forth an intelligible principle.

That's not what the Fifth Circuit says. The boundaries are the intelligible principle. There's no distinction.

We go through it in our brief, all the various ways in which the statute does set forth boundaries. They talk about who is making these decisions.

The PSTF in particular as I mentioned is not just subject to the boundaries in this provision, the preventive services provision, but also is subject to the limitations in 482 U.S.C. 299b-4(a)(1) which says, as I mentioned earlier, they are limited to a review of scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services.

The ACIP can only recommend immunizations that have in effect a current recommendation with respect to the individual involved. And, of course, the CDC director, as I said earlier, has to sign off. So -- but ultimately, Big Time Vapes precludes their claim here.

As far as the RFRA claim goes, I'm happy to rest on the briefs, given my colleague's representation that they're limiting their claim to the prEP mandate.

THE COURT: Is either the director of the CDC or the Secretary of HHS, would they be able to reject ACIP recommendations before they take effect?

Your colleague, in his briefing papers and here today, points out that the time difference means that they

are officers.

MR. LYNCH: Right. So, by law, the ACIP recommendations do not take effect until the CDC director says they do. The CDC director's concurrence is what gives them effect. Otherwise, they are advisory recommendations from a federal advisory council.

THE COURT: Okay. And so, is there a difference then in recommendations and the mandate?

MR. LYNCH: So the recommendations that are accepted by the HRSA administrator and the CDC director, that's when the coverage requirements take effect. That's when they become coverage requirements. Otherwise, they're just recommendations or guidelines.

THE COURT: So there is a difference?

MR. LYNCH: Yes.

THE COURT: That is, ACIP, HRSA, they will make recommendations. They're not in effect. Insurance companies do not have to comply with them?

MR. LYNCH: Correct.

They take effect when the HRSA administrator agrees to support HRSA and the CDC director agrees to accept the basic recommendations.

THE COURT: And so, on the HRSA then, when the administrator agrees, that's when the mandate will flow to the private sector?

MR. LYNCH: Correct.

THE COURT: And even absent the Secretary accepting them, ratifying them, taking any action, vis-a-vis the recommendation?

MR. LYNCH: Right. They're inferior officers who can make that decision. You know, they are subject to the direction and supervision of the Secretary. The Secretary could stop them presumably, but --

THE COURT: So could the Secretary, if the HRSA administrator says, I agree and support and recommend, could the Secretary intervene and say, do not allow your authority to take effect and mandate to the private sector?

MR. LYNCH: So for certain the Secretary could remove those officers before they take that step. I am not 100 percent certain whether the Secretary could, if they say, accept the recommendation, somehow stop it in mid-course.

I would want to consult with HHS on that, and I could respond in a notice in a few days, if your Honor wishes.

THE COURT: Okay. Fine.

Because I do think that's an important issue that the plaintiffs are putting forth. Of course, all of them are. But they're saying, notwithstanding your arguments, there could be a time period in which the HRSA administrator

or the ACIP people could make recommendations, support policies that would go into effect before the Secretary could get around to acting on it, and that affects the status of that, whether they're officers -- principal officers or not.

MR. LYNCH: But to be clear, your Honor, of course, here, since the Secretary has now accepted all of them that's not an issue at the moment.

THE COURT: Right. But doesn't their argument go to the fact of the evidence of or the details relating to what their status is, vis-a-vis the appointments clause of the Constitution, right?

In other words, he's coming in and saying he ratified it. And so, therefore, there's no problem. But they're also saying, this is evidence of the fact that they must be appointed pursuant to the appointments clause.

MR. LYNCH: I understand the point, your Honor, and I will get back to you on that issue.

THE COURT: And they also cite in their briefing the language from the Little Sisters of the Poor where the majority opinion talks about this sweeping, this very broad authority granted to the HRSA.

And so, doesn't that lend additional support to their argument that they need to be appointed consistent with the appointments clause?

MR. LYNCH: So I don't believe that the Little Sisters decision helps their argument at all. Little Sisters affirms regulations in which the department directs HRSA to exempt certain parties from any guideline.

The department can only do that if they have authority to stop those guidelines. You know, if my friend's argument is correct, then the regulations that Little Sisters upheld would be invalid because the department would have no authority to tell HRSA what to do about these things. That's not what happened in Little Sisters.

THE COURT: As it relates to the Task Force, you mentioned that they are volunteers, and then you cite to the Fifth Circuit's analysis in Riley vs. St. Luke's that there's got to be some kind of continuing and formalized relationship of employment. And then, of course, you talk about the OLC opinion.

But as it relates to the language in that case, it talks about the relationship of employment, does that necessarily mean paid? That they have to be paid?

MR. LYNCH: I think it definitely does it's following up on Supreme Court decisions that go back a century that make clear that it's about emolument and payment to get that appointment relationship. We cite those in our brief.

THE COURT: And so, if you have an intern, an unpaid intern working for you for a year or for a summer or something, would they then not be considered employed or in an employment relationship?

MR. LYNCH: From the perspective of the appointments clause, I think so, yes.

THE COURT: Okay. Okay. Anything else?

MR. LYNCH: That's it for me. Thank you, your Honor.

MR. MITCHELL: Thank you, your Honor.

Just a few points briefly in response to what Mr. Lynch has said.

He does rely on the statute governing the Public Health Service, but it's important to bear in mind, the U.S. Preventive Services Task Force is not part of the Public Health Service. Only ACIP and HRSA are included in that. So that argument can only work for the two of the three relevant entities.

Second, I agree with Mr. Lynch, there's nothing wrong with having a nonofficer make recommendations to an inferior or principal officer, but these are not recommendations.

I know the statute calls them recommendations, but that's not what they are. They take effect as law, as binding legal obligations once they are "Recommended" by the

relevant entity.

So I understand that is the term that appears in the Affordable Care Act, but it's somewhat Orwellian to say that these are recommendations in the way that a law clerk might recommend something to the judge for whom he works. This is something that takes effect without approval from any superior in the government.

Mr. Lynch relies on Riley against St. Luke's Episcopal Hospital, which I did not address in my opening remarks. It's a binding precedent of the Fifth Circuit so it has to be taken very seriously.

The opinion from Judge Smith does say that an officer must, in his words, "Have a continuing and formalized relationship of employment with the United States government."

But this does not require paid employment. There's nothing in the opinion that says that. And the opinion from the Office of Legal Counsel in 2007 emphatically rejects the idea that paid employment is necessary to be an officer of the United States.

So it would not be prudent, in our view, to interpret the Riley opinion in a manner that contradicts the views of the Office of Legal Counsel.

It's certainly not necessary to interpret the word "employment" to require paid employment. A person can

employ another individual without paying them. You can employ a thing without paying it.

If one looks at the statute in the U.S. Preventive Services Task Force, this is a statute that creates the entity, the U.S. Preventive Services Task Force. This was a statute passed by Congress in 1984 that defines its role, creates it, sets forth how it will be convened, describes its membership.

So there is employment with the federal government, even if its members aren't being paid by the federal government for those services.

THE COURT: Is that why you think it's different than the stand ANSI or the state statutes that federal laws and regulations incorporate?

The difference here is --

MR. MITCHELL: That's right.

THE COURT: -- the federal government creates this?

MR. MITCHELL: That's exactly right. This is a creation of a federal statute, as opposed to these other entities that exist independent of the federal government. They weren't created by it. The states, likewise, they were just state government entities.

So there is an employment relationship here, because this Task Force exists because of the federal

statute that brought it into being.

And then, finally, Mr. Lynch relies on the statutory language that says, "To the extent practicable, the task force shall be insulated from political pressure," and the citation is 42 U.S.C. 299b-4(a)(6). To the extent practicable.

Now, the word "practicable" means that you should do whatever is necessary to ensure political independence without resorting to ridiculous or cost-prohibitive measures.

It does not mean that the statutory requirement can be ignored simply because there might be an appointments clause problem created by its interaction with other provisions of the U.S. Code. So I don't think that's a tenable construction of that phrase, "to the extent practicable."

What that requirement is, is to take all means that are necessary and reasonable to insulate and protect the members of the Task Force from any type of political influences with respect to their so-called recommendations.

And they were recommendations before 2010. But to call them recommendations after 2010, again, that's a misnomer once the Affordable Care Act was signed into law.

So that's all I have, your Honor. Unless you have further questions?

THE COURT: Just in terms of the removal of the Task Force officers --

MR. MITCHELL: Yes.

THE COURT: -- is it your belief they can or cannot be removed by the Secretary or President?

MR. MITCHELL: Under the statute, they can't be, because they have to be protected from political pressure.

Now, under the vesting clause, they should be removable at-will if they're exercising authority under the laws of the United States. Because, in our view, the Constitution does not provide for independent entities to make these types of decisions without presidential oversight. So this is the line of case of Myers, Humphrey's Executor.

The recent decision from the Supreme Court, especially the Seila law from 2020, really seems to treat Humphrey's Executor almost as a one-off, and Morrison against Olson.

The rule seems to be, from the current membership on the Supreme Court, that people who wield power either in the executive or the administrative branches should be subject to presidential removal, unless you're in the Humphrey's Executor box or the Morrison box, and neither of those applies here.

So we do believe, given what Article II -- given

the way it's currently being interpreted by the Supreme Court, there is a serious vesting clause problem with this statutory regime where they can't be removed.

THE COURT: Thank you.

MR. MITCHELL: Thank you, your Honor.

THE COURT: Would you address the removal power? Who has the removal power over the members of the Task Force?

MR. LYNCH: Both the Secretary and the HRQ director. The statute says that the director of the agency for, I believe it's Healthcare Research and Quality, HRQ, convenes the Task Force and can remove its members. There's no limitation on that.

THE COURT: Okay. And can the Secretary override a nonrecommendation from either ACIP or HRSA or the Task Force?

And I don't know if overrides is the right word, but if they do not recommend or they do not support, whichever provision applies, is the Secretary empowered then to step in and say, "I, Secretary Becerra, mandate now that private insurance must cover this, notwithstanding ACIP's decision, HRSA's decision, the Task Force's decision."

MR. LYNCH: Let me confirm 100 percent with HHS on this, but the example I can think of is actually the COVID vaccine we were talking about, the CDC director saying, when

ACIP made the recommendation that the COVID vaccine only be available to a subset of -- the booster shot only be available to a subset of the population. The CDC director authorized it to be available to a larger group. So that is going beyond what they recommend, but I would want to double-check.

THE COURT: Okay. All right. Yeah, why don't you do that.

MR. LYNCH: Thank you, your Honor.

THE COURT: And just so I'm clear here, Mr. Mitchell, the relief you are seeking is an injunction or declaration and that that applies to the plaintiffs in this lawsuit?

You are not seeking a nationwide injunction or universal injunction, whatever it's called?

MR. MITCHELL: We are requesting that, your Honor.

THE COURT: Okay.

MR. MITCHELL: Perhaps this has not been briefed, and I didn't want to get too far ahead of myself by addressing the scope before the Court had ruled on our motion for summary judgment. Perhaps it might be appropriate to brief --

THE COURT: I see.

MR. MITCHELL: -- if the Court rules on the merits of our claims, what the scope of the declaratory injunctive

relief should be.

We did not bring this to a class action. So there has not been a class certified. There would be questions with respect to the individual plaintiffs.

Sometimes, under Fifth Circuit precedent, it is permissible to extend relief beyond the named plaintiffs, even in the absence of a certified class if that is necessary to give the plaintiffs relief needed to address their injuries.

We believe, with respect to our individual plaintiffs, they would need universal relief in order to enable them to obtain on the market the type of health insurance they want. So that would be our request. But again, that hasn't been briefed yet.

THE COURT: All right.

MR. MITCHELL: So it might be advisable to request briefing.

THE COURT: Okay. Then I will work through the merits before --

MR. MITCHELL: Yes.

THE COURT: -- and we will see if we need to address that.

MR. MITCHELL: There was a lot to address in the summary judgment motion, and I didn't want to overburden the Court by getting into the specifics.

THE COURT: Anything else?

MR. MITCHELL: Nothing further, your Honor.

MR. LYNCH: No. Thank you, your Honor.

THE COURT: Okay. Thank you all for being here.

We are in recess.

You're free to go. I had another case before you all.

(The proceedings concluded at 10:41 a.m.)

REPORTER'S CERTIFICATE

I, ZOIE WILLIAMS, RMR, RDR, FCRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter to the best of my ability to hear.

Further, due to the COVID-19 pandemic, some participants are wearing masks, and/or appeared via videoconferencing, so proceedings were transcribed to the best of my ability.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 22th day of September, 2022.

___/s/ Zoie Williams_____
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